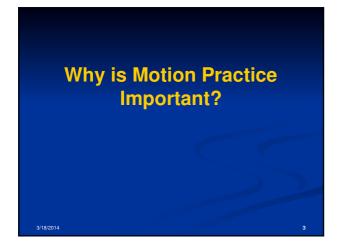


Important Rules Evidentiary Hearings Substantive areas – pre-trial motions Post-trial Motions





Was the motion timely filed?

Rule 16.1(b):

- 20 days prior to the actual trial date
- Such other time as the court may direct
- Scope: All motions

*But jurisdiction can be raised at any time

Rule 16 applies to motions in limine

A motion *in limine* requesting suppression of evidence is nothing more than a motion to suppress and it must be timely filed within the limits of Rule 16.

State v. Zimmerman, 166 Ariz. 325 (App. 1990)

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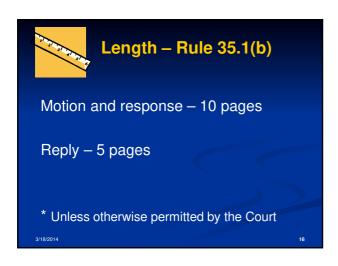
Rule 16 applies to constitutional issues	
Preindictment delay (Montano)	
■ Voluntariness (<i>Alvarado</i>)	
■ Speedy Trial (<i>Lee</i>)	
3182014 7	
What if the mation was untimely	
What if the motion was untimely	
Rule 16.1(c) says an untimely motion "shall be precluded"	
Your first response to an untimely motion should be to ask for preclusion	
3/18/2014 8	
Does this mean untimely motions are always precluded?	

No	
The court has discretion to hear late motions.	
Invocation of Rule 16.1(c) rests in the discretion of the court – reviewed for abuse of discretion.	
<u>Zimmerman</u>	
3/18/2014 10	
Hallanda mallana	
Untimely motions	
If request to preclude is denied, ask for time to respond.	
	-
3/18/2014	-
Exceptions to the 20-day rule: Rule 16.1(c)	
Basis unknown	
 Could not have been known 	
 Raised promptly upon learning 	
	-



Computation of Time Do not count the day the motion was filed If less than 7 days – don't count weekends or holidays Add 5 days for mailing

Rule 1.3 Computation of Time Rule 1.3(a) – Mailing includes every type of service except hand delivery



Form – Rule 35.1(a) Typewritten Double Spaced 8.5 x 11 inch paper Short, concise statement of relief requested Memorandum with specific factual grounds and precise legal points



Rule 8.2 Time Limits

- Defendants in custody 150 days from arraignment
- Defendants released from custody 180 days from arraignment

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Rule 8.2 Time Limits

New trial:

- Mistrial or motion for new trial –
 60 days from entry of order
- Reversal of judgment on appeal –
 90 days from service of mandate by appellate court

Rule 8.1(d) Duty of Defense Counsel
Defense counsel has a duty to advise the court of impending expiration of time limits
Failure to do so may result in sanctions and should be considered in determining whether to dismiss an action with prejudice pursuant to Rule 8.6
3/18/2014 22

Rule 8.4 Excluded Periods

Delays occasioned by or on behalf of the defendant (absence, competency determination)

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Violation of Rule 8

Rule 8.6 – Dismissal may be with <u>or</u> without prejudice

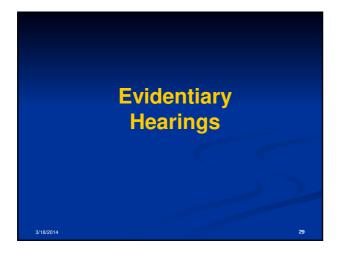
Defendant needs to show actual prejudice for dismissal to be with prejudice

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Speedy Trial Barker v. Wingo, 407 U.S. 514 (1972) Length of delay Reason for delay · Whether defendant timely asserted his right to a speedy trial Any prejudice to the accused Responding to a Rule 8 / **Speedy Trial Motion** ■ Has the Defendant merely alleged a Rule 8 violation without actually calculating Rule 8 Show the court why there is no Rule 8 violation Then discuss the speedy trial factors **Preparing Your Response -- Pointers** Read the defense motion carefully Identify the issues/Frame the issues Anticipate arguments ■ Be brief, concise

Finalizing your written response Golden Rule – be professional Have someone else read your response – solicit input Always check cites



Rule 16.2(b) – Procedure on pretrial motions to suppress evidence

Burden of proof

• State

• Preponderance of evidence

Burden of going forward

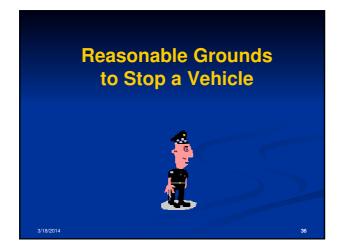
• Defendant

• Standard – prima facie showing that the evidence should be suppressed

Rodriguez v. Arellano	
Defense may cite to argue State goes first	
 Holding: Defendant satisfied his burden of going forward by showing no warrant existed 	
for the search	-
Key – entry into a home is the chief evil against which Fourth Amendment is directed	
■ Traffic stops are distinguishable	-
3/18/2014 31	
Evidence Rule 104	
Trial court is not bound by Dulco of Evidence	
Trial court is not bound by Rules of Evidence in determining preliminary questions of	
admissibility.	
→ Hearsay comes in	-
3/18/2014 32	-
3-1022/14	
What about <u>Crawford v.</u>	
Washington?	
Crawford does not apply to pretrial hearings.	
✓ <u>Gresham v. Edwards</u> , 644 S.E.2d 122 (Ga.	
2007)	
✓ <u>People v. Robinson</u> , 802 N.Y.S.2d 868 (2005)	







Reasonable Suspicion Specific articulable facts Rational Inferences → Objective analysis → Totality of the circumstances Violation of traffic law A.R.S. § 28-1594; State v. Acosta Officers may stop and detain a person to investigate an <u>actual</u> or <u>suspected</u> violation of Title 28 The violation may be civil or criminal **Stop of Vehicle** Court may consider any observed traffic violation as basis for stop. Analysis is not limited to violations that were relied upon by officer who made the stop if they are testified to in court.

Motion Practice 13

State v. Whitman, 232 Ariz. 60, 301 P.3d 226 (App. 2013)

Cunadina	
Speeding	
Driving any speed over the speed limit	
creates a presumption that the speed was not reasonable and prudent.	
3/18/2014 40	
- 40	
Training and Experience	
Officers can rely on their specialized	
training and experience.	
→ NHTSA	
3/18/2014 41	
Collective Knowledge	
Other officers/agencies	
Radio broadcasts	

"Weaving"	
■ <u>Blake</u> – weaving within the lane	
■ <u>Harrison</u> – tire "bouncing"	
■ <u>Winter</u> – weaving within the lane	
3/18/2014 43	
State v. Livingston 75 P.3d 1103 (App. 2003)	
Defendant was traveling a stretch of road that was "rural, curved, and dangerous."	
Defendant's right side tires crossed the shoulder line once by less than twelve inches.	
Trial court held no reasonable grounds to stop because Defendant did not violate	
A.R.S. § 28-729.1.	
State v. Livingston	
The Court of Appeals affirmed the suppression:	
The language "as nearly as practicable" demonstrates a legislative intent to avoid penalizing minor deviations.	

State v. Livingston	-
The count state of becomes	
■ The court stated, however:	
"[S]eemingly small factual distinctions can	
affect a court's conclusions as to the	
reasonableness of a stop." (Footnote 1)	
Avoid <i>Livingston</i> situations – Provide ALL	
Reasons/Support for Stops	
3/18/2014 46	
Pretext stops	
Whren v. United States – Eliminated the	
pretext defense	
 State v. Swanson – The officer's subjective intentions are irrelevant to the 	
analysis	
3/18/2014 47	
Community Caretaking	
• State v. Organ, 225 Ariz. 43 (App. 2010).	
(Defendant stopped on side of road, then driving 20 mph)	
Прп	
State v. Mendoza-Ruiz, 225 Ariz. 473 (App. 2010). (Defendent expected efficient converges in each of	
(Defendant arrested, officers saw gun in cab of truck and called locksmith to open truck)	

Stop of Vehicle - Tail Light State v. Becerra, 231 Ariz. 200, 291 P.3d 994 (App. 2013) (distinguishing Fikes). Officer who observed vehicle with only one taillight working did not have grounds to stop for taillight statute (A.R.S. § 28-925 requires one working taillight) but did have grounds to stop for safety concerns (A.R.S. § 28-982). Officer expressly testified he was concerned about safety.

Purpose of Exclusionary Rule

- Judicially created device
- Designed to safeguard against future Fourth Amendment violations
- Its application should be restricted to instances where its remedial objectives are most likely to be served
- Where it will not result in appreciable deterrence, its use is unwarranted

Arizona v. Evans, 514 U.S. 1 (1995).

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Exclusionary Rule

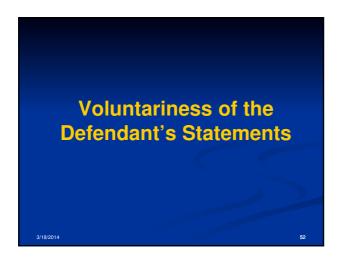
- Fact that Fourth Amendment violation occurred does not necessarily mean the rule applies
- Exclusion is a last resort
- The benefits of deterrence (of wrongful conduct) must outweigh the costs
- The abuses that gave rise to the rule featured intentional conduct that was clearly unconstitutional

Herring v. United States, 555 U.S. 135 (2009).

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All admissions are presumed involuntary This means the State has the burden of going forward and the burden of proof Standard: preponderance of the evidence



Be aware Even if the judge determines that the statements are voluntary, the defendant may still offer evidence tending to contradict the voluntary nature of the statements The jury may then disagree with the judge and reject the confession	
State v. Fimbres	
Defendant wanted to suppress physical evidence and statements	
Prosecutor unprepared	
Court granted motions to suppress without evidentiary hearing	
3/18/2014 56	
310/2014	
Physical Evidence – suppression reversed	
THIS TOWN MITHOR OF SUPPLICATION TO TOTAL	
The burden of production is on the	
defendant Argument of counsel is not evidence	
There was no evidence before the court to	
support the suppression	



Miranda When Custodial interrogation Application Law enforcement Intent Officer's subjective intent is irrelevant

Factors indicative of custody Site of interrogation Whether investigation focused on accused Whether objective indicia of arrest present Length and form of interrogation Brief roadside questioning is not custodial interrogation. Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984).

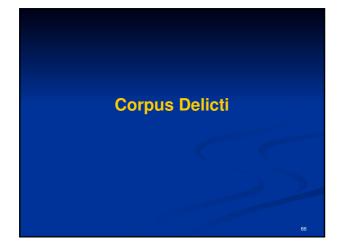
ls an express waiver of	
Miranda needed?	
No.	
Answering of questions after a proper advisement constitutes a waiver by	-
conduct.	
3/18/2014 61	
Exceptions to Miranda:	
Booking questions	
Dooking questions	
Spontaneous statements	-
Non-custodial statements (roadside	
questioning)	
 Asking the defendant to perform FSTs and take the breath test 	
3/18/2014 62	
	-
Probable Cause to Arrest	
	-

Standard: "The police have probable cause to arrest when reasonably trustworthy information and circumstances would lead a person of reasonable caution to believe an offense has been committed by the suspect." State v. Moorman, 154 Ariz. 578 (1987)

Totality of the circumstances Objective analysis

3. Officer entitled to draw reasonable inferences from the facts in light of his/her own experience

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Corpus Delicti Rule Before Defendant's incriminating statement comes in at trial, the State must show: 1) A reasonable inference that 2) A crime was committed by some person. State v. Jones, 203 Ariz. 1, 23 (2002)

PURPOSE FOR RULE Concern Confession is Untrustworthy due to: 1. Mental Instability, or 2. Improper Police Procedures State v. Superior Court (Plummer, RPI), 188 Ariz. 147 (App. 1996) Point out there is no concern about either of the above



Corpus Delicti

May be proved by circumstantial evidence alone.

State v. Rivera, 103 Ariz. 458, 445 P.2d 434 (1968).

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Order of proof

- Evidence used to establish the reasonable inference need not be before the statement.
- A variation in the order of proof does not constitute prejudice.

State v. Gerlaugh, 134 Ariz. 164 (1982)

7

A.R.S. § 28-1388(G)

- Statutory exception to corpus requirement
- Allows for admission of the defendant's statement that he/she was driving a vehicle involved in an accident resulting in injury or death to any person



Motion Practice 24

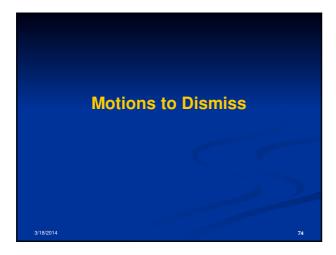
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DUI Corpus Case:

■ State ex rel. McDougall v. Superior Court (Plummer, Real Party in Interest), 188 Ariz. 147, 933 P.2d 1215 (App. 1996).

(Officer observed impaired driving. Both potential drivers were drunk – sufficient evidence that some person committed the crime of DUI)

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Motions to Dismiss

Common types:

- Right to counsel
- Destruction of evidence
- Jurisdiction
- Speedy trial/Rule 8
- · Sufficiency of the complaint

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Burden of Going Forward	
Defendant	
Burden of Proof	
Defendant	
3/18/2014 76	
Right to Counsel	
Sixth Amendment Right	
Attaches when criminal proceedings are	
initiated	
Fifth Amendment Right	
Applies when the defendant is in custody	
and being interrogated	
3/18/2014 77	
Right to Counsel	
Defendant's invocation of right to counsel	
must be <i>unequivocal</i>	
 Davis v. U.S., 512 U.S. 452 (1994) ("Maybe I should talk to a lawyer" was not 	
unequivocal)	
Asking "who a good attorney would be" was	
not an unequivocal invocation.	
· State v. Linden, 136 Ariz. 129 (App. 1983)	

Right to Counsel	
Defendant has a right to a private	
conversation with an attorney, but he must	
specifically ask for privacy.	-
State v. Waldron, 157 Ariz. 90, 754 P.2d	
1365 (App. 1988)	
3/18/2014 79	
Right to Counsel	
riight to Counsel	
The right to counsel belongs to the suspect,	
and the suspect must invoke that right.	
 Moran v. Burbine, 475 U.S. 412 (1986) 	
(suspect's sister tried to retain attorney; attorney	-
contacted station, but was not given opportunity to be present during questioning)	
3/18/2014 80	
Right to Counsel	
Moran v. Burbine holding adopted in Arizona	
Moran V. Baroine Holding adopted in Anzona	
State v. Transon, 186 Ariz. 482 (App. 1996)	
(DUI suspect's wife had attorney contact police station and try to talk to defendant; attorney was	
not given opportunity to speak to defendant,	
defendant was not advised that attorney wanted to speak to him, and defendant never requested	
an attorney)	
3/18/2014 81	

Right to Counsel – Remedy for Violation In a DUI case, dismissal is only appropriate where the State's actions hindered the defendant's ability to gather exculpatory evidence. State v. Keyonnie, 181 Ariz. 485 (App. 1995) State v. Rosengren, 199 Ariz. 112 (App. 2000)

Directed Verdict/ Judgment of Acquittal

Rule 20 – Judgment of Acquittal Oral Court or defendant may raise Standard: substantial evidence to warrant a conviction

What if the Rule 20 motion is denied and the defendant decides to present evidence? If the defendant goes forward and presents his case, he waives any error in the denial of the Rule 20 motion where deficiencies in the State's evidence are

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supplied by the defense



Rule 24.1 – Motion for New Trial Must be filed within 10 days of the verdict (this is jurisdictional) Grounds Verdict is contrary to law or evidence Prosecutorial misconduct Juror misconduct Court error in matter of law or jury instructions For any other reason defendant did not receive a fair trial

Preparing for the Hearing: Practical Pointers

What if your witnesses fail to appear? If the witness is essential: See if the defense will stipulate to testimony Consider moving to continue the hearing to the time of trial Consider who has the burden of producing evidence Ask the court to bifurcate the hearing

Exhibits	
 Mark ahead of time Keep a list of exhibits marked and 	
admitted Make copies of documents for the State's	
file Substitute copies for originals if necessary	
(17A A.R.S. <i>Rules of Evid.</i> , Rule 1003)	
3/18/2014 91	
State's Witnesses	
Have witness review report	
Explain purpose of hearing	
 Ask about discrepancies/omissions 	
3/18/2014 92	
State's Witnesses	-
Have witness prepare time chronology	
chart or diagram	
 Review general principles of testifying 	
(testify chronologically, speak up, answer yes or no, TELL THE TRUTH)	
ariswer yes or no, TELE-THE TROTTI)	

Defense Witnesses

- · Interview prior to the hearing
- · If not disclosed, move to preclude
- Always have another person (preferably a police officer) present during the interview

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Making a Record



- · Identify yourself for the record
- Have witnesses spell their names
- · Be record conscious
- · Listen closely to the witnesses
- Ensure all arguments are on the record
- · Do not speak over others
- Consider what information you will want on the record in the event of an appeal

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What if the defendant fails to present a prima facie case?

Ask the court to summarily deny the motion

Remember, the State's burden arises only after the defendant has presented a prima facie case for suppression – Rule 16.2(b)

If the court denies your request, it may give you an indication of what evidence it believes is lacking

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The Judge's Ruling
If the judge is making your point for you, it is
wise to keep quiet
If the court rules against you, ask the court to
state the basis on the record (this will
narrow the issues on appeal)
Consider whether there is adequate evidence
to go forward or whether to appeal
3/18/2014 97
Reconsideration
Heconsideration
Rule 16.1(d) - Finality of Pretrial Determinations
1 1 1 (c) 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1
"Except for good cause, or as otherwise provided by
these rules, an issue previously determined shall not be reconsidered."
See State v. Kangas, 146 Ariz. 155 (App. 1985) (court
criticized practice of seeking horizontal review by another judge at the same level)
3/18/2014 98
Use of suppressed evidence
for impeachment
ioi impeaciment
Illegally seized evidence that has been
excluded from the State's case-in-chief may
be used to impeach the defendant if he
chooses to testify
United States v. Havens
Harris v. New York
State v. Menard

Appeal by the State		
A.R.S. § 13-4032		
▶Dismissal		
➤New trial		
>Illegal Sentence		
Suppression		
3/18/2014	100	

